UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PAE APPLIED TECHNOLOGIES, LLC

and Cases 28–CA–170331

SECURITY POLICE ASSOCIATION
OF NEVADA

Nathan A. Higley, Esq.,
Stephen P. Kopstein, Esq.,
for the General Counsel.
Jeffrey Toppel, Esq.,
for the Respondent.
Nathan R. Ring, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Las Vegas, Nevada from July 12–13, 2016. The Security Police Association of Nevada (Charging Party, Union, or SPAN) filed the charge in case 28–CA–170331 on February 22, 2016, and amended charge on April 29, 2016.[1] The General Counsel issued a complaint and notice of hearing on May 9. PAE Applied Technologies, LLC (Respondent, Employer, PAE, or Company) filed a timely answer.[2]

The complaint alleges that Respondent violated numerous sections of the National Labor Relations Act (the Act). First, Respondent allegedly violated Section 8(a)(1) of the National Labor Relations Act (the Act) when security officer and Union President John Poulos (Poulos)

[1] All dates are in 2016 unless otherwise indicated.

[2] At the hearing, the General Counsel issued an order that severed case 28–CA–170331 from the consolidated complaint, and withdrew complaint paragraphs 1(a) and 5(a) through 5(c). Furthermore, the General Counsel approved the Charging Party's request to withdraw the charge in case 28–CA–165334. Finally, the General Counsel motioned to amend the complaint at the hearing which I granted over Respondent's objection.

invoked his rights for union representation under *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), on the following occasions: (1) on February 18, Security Manager John Costello (Costello) via telephone denied Poulos' request to be represented by a union representative of his choice during an interview; (2) on February 19, Human Resources/Labor Relations Manager Robert Williams (Williams) and Costello, in person, denied Poulos' request to be represented by a union representative of his choice during an interview when the representative was available; (3) on February 22, Williams via written message denied Poulos' request to be represented by a union representative of his choice during an interview; and (4) on February 24, Security Specialist James Rutledge (Rutledge) required Poulos' union representative to be silent thereby denying the representative's ability to provide assistance and counsel to the employee being interviewed. During each of these instances, Poulos had reasonable cause to believe the interview would result in disciplinary action taken against him. Furthermore, on February 24, Williams and Rutledge conducted the interview with Poulos even though Respondent denied his request for union representation of his choosing.

Second, the complaint alleges that by issuing Poulos on March 24 a final written warning, Respondent also violated Section 8(a)(3) and (1) of the Act.

Third, the complaint alleges Respondent violated Section 8(a)(1) when on February 24, Williams and Rutledge interrogated employees about their union activities.

Fourth, the complaint alleges Respondent violated Section 8(a)(1) of the Act when on February 24 and March 24, respectively, it promulgated and since maintained the following rules or directives: (1) union representatives are not permitted to participate in any defense or ask any questions; only upon notification by the Employer may they talk after the completion of investigatory interviews; and (2) the Customer (United States Government) has stated that you or any other officer of SPAN refrain from directly contacting any Customer officials on any matters that involves concerns with employees regarding violations, outcomes, determinations, interpretations or grievances that involve the CBA between the Company and SPAN. Any issues or concerns regarding the CBA are to be brought to the proper member of the chain of command of the Company.

Finally, the complaint alleges Respondent violated Section 8(a)(5) and (1) of the Act since about February 22 when Williams, in writing, failed and refused to furnish the Union with information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the bargaining unit. The information requested by the Union was the following: a copy of the customer complaint lodged against Poulos as well as the allegations contained therein.

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel, Respondent, and Charging Party,[5] I make the following

[3] The transcripts in this case are generally accurate, but I make the following corrections to the record: Transcript (Tr.) 58, Line (L.) 1: "fill" should be "file"; Tr. 88, L. 25: "load" should be "loud"; Tr. 96, L. 12: "sad" should be "said"; Tr. 142, L. 6–7: "bargain at" should be "bargaining"; Tr. 203, L. 22: "sports" should be "support".

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION INVOLVED

Respondent is a corporation with an office and place of business in North Las Vegas, Nevada, where it is engaged in providing security services to the United States, which has a substantial impact on the national defense of the United States. In conducting its operations during the 12-month period ending December 2, 2015, Respondent's services were valued in excess of $50,000, and Respondent purchased and received at its facility and at its locations within the State of Nevada where it provided security services to the United States, goods valued in excess of $5,000 directly from points outside the State of Nevada. Thus, at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Furthermore, at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. RESPONDENT'S ORGANIZATION

Respondent, a government contractor, provides security patrol services at United States Air Force military installations including the Tonopah Test Range (TTR), Nevada Test and Training Range (NTTR), and Nellis Air Force Base, which are Las Vegas locations of Respondent's Range Support Services (RSS) Program. Respondent organizes its employees in a quasi-military structure with captains, majors, lieutenants and security officers. Respondent's security officers patrol eight locations which cover hundreds of square miles. The security officers have top secret security clearance (Tr. 64–65). The United States has general service (GS) employees, including Directors of Security Forces Raymond Allen (Allen) and Craig Farnham (Farnham), in these various locations that interact with Respondent's employees.

With regard to discipline, Costello, as Respondent's Security Manager, has authority to request discipline of PAE employees but needs approval for discipline (Tr. 25). Respondent does not permit United States government employees to discipline its employees (Tr. 41). However, Allen and Farnham may revoke Respondent's employees' authority to carry weapons which is essential to carry out their job functions.

III. THE UNION AND THE COLLECTIVE-BARGAINING AGREEMENT

On August 31, 2001, the National Labor Relations Board (the Board) certified the Union as the exclusive collective-bargaining representative of a unit of full-time and regular part-time security officers performing guard duties as defined in Section 9(b)(3) of the Act. Respondent and the Union are bound to a collective-bargaining agreement (CBA) through September 30, 2017 (GC Exh. 2).

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[4] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[5] Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; "CP Br." for Charging Party's brief; and "R. Br." for Respondent's brief.

Of relevance, CBA Article 16, Section 2, Union Representation states,

> One (1) working steward may be appointed by the Union at each location who will represent the Employees on the job, subject to the supervision of the local Union president. The Contractor shall be informed in writing the names of the appointed stewards. If the Contractor deems it necessary to discharge a steward, it will inform the Union beforehand unless the Union cannot be contacted through diligent, good faith efforts.

Article 36, Section 4 of the CBA states,

> Employees have the right to Union representation at all meetings with management that could result in disciplinary actions or other adverse consequences, up to and including termination. In cases of written reprimand, suspension without pay, or discharge, the Contractor [PAE] agrees to notify the appropriate Union representative prior to taking such action when reasonably possible.

During the relevant time period, Poulos served as Union President, and Joshua Lujan (Lujan) and Timothy Campbell (Campbell) served as Union Vice-Presidents. As Union President, Poulos filed several grievances against Respondent. Poulos, Lujan and Campbell have top secret security clearance because they are security officers for PAE.

IV. ALLEN COMPLAINS ABOUT HIS FEBRUARY 16 INTERACTION WITH POULOS

On February 17, Allen complained to Costello about a February 16 interaction he had with Poulos in PAE Security Major Thomas Fisco's (Fisco) office. Allen informed Costello via email that he filed a classified complaint with his employer about an issue with "John Poulos/SPAN President" (GC Exh. 3; Tr. 65). This classified complaint required top secret security clearance for viewing.[6]

As background, on or about February 5, Allen and Farnham revoked the right to bear firearms of two PAE security officers due to their arrests for suspected driving under the influence.[7] As part of the government's investigation, Allen and Farnham interviewed Respondent's leadership and coworkers.[8] Fisco called Poulos, as union president, to inform him of the suspensions of the two security officers. Because he did not have many of the answers for Poulos, Fisco told Poulos to contact Farnham or Allen for further details (Tr. 107, 128–130).[9]

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[6] The classified complaint has never been provided to any union official despite their request. In addition, Respondent did not inform the Union that Allen's original complaint was classified until the February 24 investigatory meeting. The General Counsel and Charging Party do not challenge that the classified complaint is designated as "Top Secret" by the United States Government.

[7] By revoking the security officers' right to bear firearms, they could not perform their security officer job duties for Respondent (Tr. 48).

[8] Costello testified that the reference to PAE leadership and coworkers was to supervisors at Respondent, not employees (Tr. 44).

[9] Fisco denies telling Poulos to speak with Allen (Tr. 129). I do not credit Fisco because Poulos'

On or about February 10, Poulos called Allen requesting clarification on the revocation of the security officers' right to bear firearms. Their conversation ended with Poulos appearing "satisfied" according to Allen (GC Exh. 3). Shortly thereafter Allen's investigation completed and the United States Government decided to reinstate the two security officers' right to bear firearms.

At some point, PAE asked Allen to create an unclassified complaint regarding the February 16 incident. His unclassified complaint stated, in relevant part:

> Approximately 1200hrs, I was in Tom Fisco's office and Mr. Poulos entered the office. For the second time, Mr. Poulos wanted to clarify why Mr. Farnham and I had revoked the authority to bear firearms. I reiterated the same information I provided to Mr. Poulos on 5 February. When asked again about revoking the site access as opposed to revoking weapons authorization, I told Mr. Poulos that I did not have the authority to revoke access. Mr. Poulos turned to me and stated something to the effect that as a GS-13 that I should "keep my nose out of this." I found this statement to be completely out of line. I reminded Mr. Poulos that Mr. [Craig] Farnham and I are the Defense Force Commanders for our respecting AOR's. We alone determine the suitability to bear firearms. It is our prerogative as [Security Force] Directors to ensure a safe working environment for all detachment members.
>
> I realize PAE has had many issues with SPAN recently. I have heard allegations of bullying by the union (SPAN). Let me be clear in stating that these are unsubstantiated allegations; but I felt that bullying attitude first hand yesterday. I was being told by the Union President to keep my nose out of an issue completely within my purview as Director of TTR Security Forces. I cannot, and will not, be subject to this type of insubordination by this contractor. Mr. Poulos has been told numerous times that he will have no interaction with the government regarding union issues; obviously he cannot even adhere to instruction given by PAE leadership. I found Mr. Poulos' behavior to be offensive and confrontational. My actions taken on 5 February 2016 were completely in line with Air Force standards and not punitive in nature. I am not sure what actions can be taken by PAE or contracting against this individual.

(GC Exh. 3).

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version of events seems more likely than not considering the entire scenario. Although Costello claims that Poulos had been instructed repeatedly not to speak to anyone working for the Customer, Costello did not document his instructions to Poulos until after Respondent decided to investigate the February 16 incident between Poulos and Allen. Furthermore, Respondent did not issue a written rule regarding this prohibition until March 24, the day Poulos was issued the final warning. Allen also did not complain about Poulos' initial discussion with him on or about February 10, but only complained after their February 16 interaction. Thus, the timing of the issuance of the documentation of the instructions to Poulos and issuance of the rule to the Union is suspect and leads me to conclude that Fisco actually did tell Poulos to speak to Allen, and never forbade him from talking to the Customer until after February 16.

Also on February 17, Fisco wrote his version of the February 16 events. Fisco wrote that Allen was in his office on February 16 at approximately 12:00 p.m. (R. Exh. 1). Fisco wrote that Poulos "entered and began to question" Allen on the administrative actions he took regarding the two security officers. According to Fisco, Poulos stated, "A GS-13 did not have the authority to confiscate weapon cards from these two individuals and with that statement Mr. Allen told Mr. Poulos that such action was well within his prevue [sic] and not to question Mr. Allen's authority and that further discussion was to cease as Mr. Allen had already discussed the matter with him previously in a phone call initiated by Mr. Poulos some days before" (R. Exh. 1). Poulos then continued the discussion. Fisco wrote, "Mr. Allen took offense to Mr. Poulos's attitude again when stating that Mr. Allen did not have the power as a GS-13 to administer such disciplinary action" (R. Exh. 1). Poulos was scheduled to attend a training class at noon, and Fisco asked Poulos three times to leave the office to go to his class but Poulos did not leave immediately. Fisco concluded, "Mr. Allen stated that Mr. Poulos had no authority to question Customer actions" (R. Exh. 1). Then, Allen and Poulos left Fisco's office at the same time.

Fisco testified at the hearing similarly albeit with minor differences. Fisco denied speaking with Poulos on February 16 except to tell him to go to his training class three times (Tr. 94–95). Fisco confirmed that Allen became agitated, offended, and raised his voice after Poulos questioned his authority to revoke the weapons' permission for the two security officers (Tr. 96, 99). Fisco claimed that Poulos repeatedly told Allen that he did not have the power (Tr. 99). Fisco also stated that Poulos essentially told Allen that he did not have authority to intervene in matters concerning the CBA (Tr. 97). Thereafter Fisco told Poulos three times to attend his scheduled training class but Poulos did not do as asked until Poulos' immediate Supervisor Steve Matthews (Matthews) came to the office (Tr. 100). Fisco stated that Poulos followed Matthews when he left the office, and does not recall Farnham's presence (Tr. 97). After Poulos left, Allen departed (Tr. 100).

Due to Allen's complaint, Costello and Fisco spoke during a conference call with Williams and Dennis Dresbach (Dresbach), who is Respondent's program manager, and Costellos' supervisor, 1 to 2 days after February 16. They determined that some type of discipline of Poulos was necessary (Tr. 32).[10] Costello testified that "the initial reaction to what he did was we were flabbergasted" (Tr. 34). Costello testified that Poulos should not have contacted Allen or any other government employee (Tr. 44–45). He also stated that Poulos' contact with Allen was the key factor in why he was disciplined (Tr. 45).[11]

V. RESPONDENT'S INVESTIGATION OF THE FEBRUARY 16 INCIDENT

Costello appointed Rutledge to conduct an inquiry into the incident.[12] Costello wanted a statement from Poulos to get "both sides of the story" before they could make a decision but also

[10] By this point, Williams and Costello reviewed Allen's complaint, including the classified version (Tr. 64). Williams also reviewed Fisco's February 17 statement (Tr. 66).

[11] According to Costello, on February 16 Poulos "barged in and interrupted" a conversation between Allen and Fisco while Allen stood in the doorway of Fisco's office (Tr. 45–46). Costello learned this information from Fisco and Allen. I do not rely upon Costello's version of February 16 events as Costello was not present for this discussion.

[12] Rutledge reviewed Allen's unclassified complaint and Fisco's statement before he questioned Poulos; Rutledge denied ever seeing the classified complaint (Tr. 190).

testified that "something would've needed to have been done once we got the inquiry completed" (Tr. 33). Costello also stated that discipline "was probably merited but we needed to complete the inquiry" (Tr. 34).

On February 18, Costello spoke to Poulos informing him that he needed to provide a statement (GC Exh. 6a).[13] Costello would not provide any details to Poulos as to why he needed to provide a statement except to say that Allen filed a complaint about Poulos (Tr. 112).[14] Poulos told Costello that Union attorney Nathan Ring (Ring) would be acting as his union representative when he made his statement (Tr. 34). Poulos also told Costello that he was engaged in protected activity when he spoke to Allen (Tr. 35). Costello responded that Ring was "not appropriate" since the matter involved discipline and he could only bring in a union representative according to the CBA (Tr. 35, 113).

Despite Costello's response to Poulos that Ring was "not appropriate," on February 19, Poulos and Ring arrived at Respondent's facility. In person, Costello reiterated to Poulos that bringing Ring as his representative was inappropriate and that Poulos could bring any member of the Union as his representative (Tr. 38, 114–115). Williams overheard the conversation, and joined the discussion. Williams also told Ring that he could not be present during Poulos' interview (Tr. 39, 59, 83). Rutledge was present for at least a portion of this conversation. Costello, Williams and Rutledge knew that Ring was counsel for the Union, and not Poulos' personal attorney. After more discussion, Poulos and Ring left Respondent's facility, and the interview was rescheduled for February 24 (Tr. 39).

On February 22, Poulos, acting as union president, discussed the issue of the investigation as well as a request for information with Williams and Rutledge. Poulos initially sent an electronic letter to Williams documenting the events that occurred leading up to that date (GC Exh. 6a). As Poulos understood at the time, Respondent sought a statement from Poulos "relative to the business performance of the Union President, engaged in discussion with Mr. Fisco on February 16, 2016, in a matter of suspension/discipline upon Union members" (GC Exh. 6b). On behalf of the Union, Poulos orally requested a copy of the complaint as well as any allegations contained within the complaint.[15] He also wanted to know when the documents would be provided to the Union "to assist in having clarification on what the subject matter involves, along with any specifics" (GC Exh. 6c).

Approximately 30 minutes after the initial email from Poulos, Rutledge contacted Poulos to reschedule the February 19 meeting. Poulos then sent an email to Williams making clear that he was not refusing to participate in the investigation (GC Exh. 7f). Poulos again on behalf of the Union requested a copy of the complaint and/or allegations against him.

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[13] Prior to their conversation, Fisco told Poulos that Costello wanted him to prepare a statement but Fisco did not provide any details as to what this statement would concern (Tr. 111–112).

[14] Despite not providing Poulos details, Costello testified that Poulos had a copy of Allen's complaint. Poulos denied having a copy of Allen's complaint. I credit Poulos' testimony. Poulos, on behalf of the Union, would not have continued to request a copy of Allen's complaint if the Union had already received it.

[15] The record is unclear when Poulos initially orally requested a copy of Allen's complaint, but the record is clear that Poulos requested the complaint in writing no later than February 22.

Williams responded, telling Poulos to set a specific time for the interview and get a representative (GC Exh. 7e). Poulos wrote back to Williams, reiterating that the Union had designated its counsel to represent him which Respondent continued to ignore (GC Exh. 7d). Poulos wrote, "On multiple occasions over the past 4 days the Union has stated that the designated representative for the Union President IS AND SHALL BE the Union Legal Counsel" (GC Exh. 7d (emphasis in original)). Williams told Poulos he could not bring in "legal counsel"; Williams then set the meeting time and provided Poulos with a list of union representatives from which he could choose (GC Exh. 7c). Williams provided the list of acceptable representatives from the Union's list of officers per CBA Article 16 (Tr. 66–67). However, the CBA contains no language limiting which union representative may attend investigatory meetings (Tr. 67–68).

Poulos "begrudgingly" agreed to attend the meeting with Lujan as his representative (GC Exh. 7b). Again, Poulos on behalf of the Union requested information regarding the alleged complaint, and asked the information to be produced before the investigatory meeting. Williams then denied the Union's requests for information since the investigation was on-going and Respondent was not obligated to provide this information prior to Poulos' interview so as not to prejudice the investigation (Tr. 68). Williams failed to mention to the Union that the information sought was classified. Despite not providing the Union with a copy of Allen's complaint, Williams insisted that Poulos "knew what he was responding to" (Tr. 69).

Also on February 22, Costello prepared a statement regarding past events (R. Exh. 1). Costello wrote that several months prior he received many complaints about Poulos contacting "exempt employees and government employees about how to conduct their business." Costello spoke to Poulos in person and asked him "not to have any union contact with the Government Customer." Costello wrote that Poulos became angry, and after he asked him to sit down, they continued the conversation where Costello reiterated Poulos' obligation not to talk to the Customer.

On February 23, Union President Poulos sent an electronic letter to Williams (GC Exh. 7a). The letter disagreed with Respondent's position regarding the information request as violating the Act and hindering the Union's ability to represent its members (GC Exh. 8 and 9).

The Investigatory Meeting

On February 24, Poulos with Union Representatives Lujan and Campbell met with Rutledge, Contract Program Security Officer Anthony Marvez (Marvez), Williams, and Human Relations Specialist Latanya Williams Coleman (Coleman) in a conference room at one of Respondent's facilities.[16] At the start of the meeting, Poulos informed Rutledge that he was engaged in protected activity when he spoke to Allen on February 16 (Tr. 119–120). Lujan and Poulos also asked for a copy of Allen's complaint but Respondent refused, now informing them for the first time that Allen's complaint was classified (Tr. 122, 151, 193, 195). Lujan and Poulos, due to their top secret security clearance, knew that they had the clearance to view the

[16] Coleman did not attend the entire meeting, and did not testify at the hearing.

classified complaint, but again Respondent refused, claiming that they could not view the classified complaint in the room in which they were meeting (Tr. 122, 126).[17]

Lujan told Rutledge he had questions, and he began asking his questions (Tr. 85). However, everyone in the room quickly began talking so Rutledge told everyone that they must stop talking and all questions needed to come through him (Tr. 84–85, 166, 194). Rutledge explained at the hearing that he based his investigative technique on his experience as well as Air Force materials. Lujan testified that Rutledge reinforced his "no talking" rule when Lujan tried to speak to Williams (Tr. 168). According to Poulos, Rutledge told the two union representatives that they would not be able to talk until he tells them they can (Tr. 120). Rutledge also would not allow any questions while Poulos wrote his statement (Tr. 73, 85, 193). One of the union representatives sought to ask a question while Poulos wrote his statement, but Rutledge would not allow any questions pertaining to Poulos until after his statement was completed (Tr. 148, 193). Rutledge testified vaguely that Campbell left the room with one of Respondent's employees to ask his question (Tr. 193–194).[18]

Complaint paragraph 5(j) alleges that Respondent orally promulgated the following rule at this meeting: union representatives are not permitted to participate in any defense or ask any questions; only upon notification by the Employer may they talk after the completion of investigatory interviews.

Poulos informed Rutledge that he was providing his statement as the union president (Tr. 86). Thereafter, Poulos wrote a statement documenting his version of events of February 16. His statement is summarized as follows:

> At 11:50 a.m., he walked into Fisco's office to talk with him about written language in the suspension letters the two security officer received. This language "was in extreme contrast to the prior discussion which had taken place with Mr. Fisco the week prior." Allen was in Fisco's office, and Poulos essentially asked to speak with Fisco by "excusing" himself. Poulos noted that a week prior to the February 16 event, Fisco told him to contact Allen or Farnham regarding any additional information he may need about the government's actions. Accordingly, Poulos contacted Allen to discuss the weapons' licensing issue regarding the two security officers. Poulos let Allen know that he was calling as the Union president. During their discussion Poulos told Allen that the Union was not concerned about the Government's actions and only sought clarification. Therefore, when the Union received copies of the suspension letters, the Union felt that Respondent placed additional language in the letters which had not been discussed with the Union. Thus, Poulos sought to speak with Fisco. During the February 16 conversation between Poulos and Fisco, Allen "appeared to think that the questions put forth to Mr. Fisco were about his actions" (R Exh. 1). Allen then told Poulos that he did have the "authority to do things." Poulos wrote that he responded politely as Union president and advised Allen that he did not have the authority to get involved in issues concerning the Union CBA. According to Poulos, "Allen began to yell and shout about

[17] However, the classified complaint could have been viewed by those with the appropriate credentials in a secure location within the same building (Tr. 126).

[18] Campbell did not testify at the hearing.

how he is a commander and does have the authority." After this "outburst," Farnham came into the doorway of Fisco's office and explained to Poulos Respondent's actions. After a discussion with Farnham, Poulos left and went to training.

At the hearing, Poulos testified that he went into Fisco's office to speak with him about the language in the disciplinary letters; Poulos denied knowing that Allen would be in the office with Fisco (Tr. 105). Poulos testified that he went into the office 10 minutes before his noon training class, and the interaction only lasted 6 to 7 minutes (Tr. 134–135). Poulos excused himself to speak with Fisco about the language in the letters. Instead of only Fisco responding, Allen responded explaining why he made the decisions he did regarding the security officers. Poulos told Allen he was not concerned with his actions, and "turned around to Tom [Fisco] to continue to question what was on the suspension letter" (Tr. 106). According to Poulos, Allen continued to talk about his authority and Poulos told Allen that he was more concerned with CBA issues. Poulos testified that Allen then stated he has the authority to be involved in the CBA, and Poulos disagreed. Poulos described Allen's reactions as a "five-year old child temper tantrum about everything" (Tr. 108). Poulos said he told Allen that he was acting as a union president to take care of the suspension letters for the security officers which does not involve him. Allen then began yelling and screaming that he is a commander and does have authority (Tr. 108). Allen went into the hall yelling, and according to Poulos others came up to him asking him what happened (Tr. 108–109). Poulos denied raising his voice. Thereafter, Fisco told Poulos to go to his scheduled training class three times before he complied (Tr. 109–110). Farnham, who overheard the conversation, came to Fisco's office and explained what action Allen and he took regarding the two security officers (Tr. 110). Then, Poulos went to the training class (Tr. 111).

After providing his statement to Rutledge, the meeting attendees took a break. During this break, Poulos was permitted to consult with his union representatives without his statement (Tr. 151–152, 173, 196). After the break, Rutledge began asking a series of follow up questions based on Poulos' statement (GC Exh. 9a and b; Tr. 84). Rutledge announced the question, and then Poulos provide a written response. Rutledge then read the answers out loud. Lujan testified that Rutledge told him he could ask questions after the question and answer session (Tr. 170–171, 174). Lujan admitted that he did ask a few follow up questions after the question and answer session completed.[19] Poulos denied making the statement "that a GS-13 should keep his nose out of this" and denied questioning Allen's authority to revoke the right to bear firearms (GC Exh. 9a). Later, Rutledge presented Poulos' version of the February 16 events to Fisco; Fisco denied all parts of Poulos' statement which contradicted his own.

[19] Rutledge testified that he permitted the union members to ask questions and clarify the questions while being asked (Tr. 86, 197–199). Poulos testified that Lujan attempted to ask a question during the question and answer session, but Poulos advised Lujan not to make this meeting adversarial and to "live by the rule" set forth by Rutledge (Tr. 152). I do not credit Rutledge or Poulos on this issue of when Rutledge permitted the union representatives to ask questions during the investigation. Lujan, despite being a union officer who may have a proclivity for testifying in favor of the Union's interests, testified candidly and honestly that the Union was permitted to ask questions after the question and answer session. Meanwhile, Rutledge's testimony on this point appeared vague and untruthful, and Poulos' testimony appeared to be exaggerated and directly contradicted by Lujan who was essentially testifying against his own interest. I find that after the question and answer session of the investigation, Rutledge permitted the union representatives to ask questions.

Prior to the investigatory meeting, Costello and Williams assumed that Poulos knew the allegations against him, and Costello "guessed" that Poulos received a copy of Allen's complaint as well (Tr. 36, 69–70). Subsequently, Costello testified that Poulos ultimately received Allen's email and statement (Tr. 36). However, the classified email was never released or provided to the Union (Tr. 37). The Union received a copy of Allen's unclassified complaint on or about the date Poulos was disciplined (Tr. 154).

On February 26, Rutledge prepared a memo regarding his investigation (R. Exh. 1). Along with this memo, Rutledge provided the evidence he gathered: Allen and Fisco's emails, Poulos' written statement and two page questions and answers, the February 22 memo from Costello documenting his conversation several months prior telling Poulos not to contact the Customer, Williams' memo for the record,[20] Article 36 from the CBA, a witness statement from Matthews dated March 1,[21] two suspension letters for the security officers, and follow-up phone call with Fisco after Rutledge's interview of Poulos. Rutledge did not interview or speak to Allen (Tr. 91).

VI. RESPONDENT'S DECISION TO DISCIPLINE POULOS

On March 18, Respondent's discipline review board (DRB) decided to discipline Poulos due to Allen's complaint (Tr. 41–42, 211; R. Exh. 1). The DRB members consisted of Thomas Rothwell, vice president of human relations; Donald Smith, corporate counsel; Dresbach, Williams, Costello and Fisco (Tr. 42, 207). Costello initially recommended disciplining Poulos (Tr. 214).

On March 24, Respondent issued a final written warning to Poulos (Tr. 48; GC Exh. 4a and 4b). Prior to receiving the final written warning, Poulos had never been disciplined by Respondent (Tr. 48). The document indicates that Poulos violated Article 36, Section 1 and Respondent's disciplinary policy #21.[22] Specifically, Respondent alleged Poulos violated Article 36, Section 1 due to "serious improper behavior or discourtesy toward a Customer or guest,

[20] One of the documents considered by Respondent included a February 10 "memo for record" from Williams (R. Exh. 1). Williams wrote, "On this date I received a phone call from Mr. John Poulos, SPAN President. Mr. Poulos was very rude and threatening, yelling at me over the phone about the Company telling Security Sergeants to advise other union members that they were suspended." Williams further wrote that Poulos threatened him "as to filing so many board charges that he was going to take the Company down." Williams continued, "I told Mr. Poulos that ever since he has been president that we have had nothing but problems with him and that he has already filed so many board charges that it is ridiculous […] He said he was going to keep filing board charges against PAE." Williams then advised Costello and Marvez of this conversation.

[21] In this witness statement, dated March 1, Matthews wrote that on February 16 he heard a "loud verbal confrontation" and tapped Poulos' shoulder asking him to come to the training class. Matthews noted that he found Poulos having a heated conversation about the two security guards in the presence of Farnham, Allen and Fisco. After Matthews tapped him on the shoulder, Poulos went to the training class 20 to 60 seconds later. This document is hearsay, and not accepted for the truth of the matter asserted. Rather, I accept this statement as one of several documents considered by the DRB when deciding whether to discipline Poulos.

[22] The record contains no evidence of the details or definition of Respondent's disciplinary policy #21.

insubordination, and violated PAE Policy #21 due to "violation of or non-compliance with Company Policies, Security Procedures and U.S. Government regulations, rules, policies, and procedures" (GC Exh. 4a). The final written warning states,

> On February 16, 2016, you (John Poulos) questioned a Customer official on actions taken on an incident and challenged the Customer's authority to execute actions taken. Your conduct and behavior was improper and disrespectful towards the Customer. After this occurrence, the Company received a complaint from the Customer regarding your behavior and conduct. This exhibition of conduct and behavior is unacceptable and will not be tolerated. Your actions and behavior toward the Customer has had a negative impact on the Company, as expressed in communications, and the potential negative grading of the Company's performance. The Customer has also stated that you are to refrain from directly contacting any Customer officials on any matters that involve concerns with employees regarding violations, outcomes, determinations, interpretations, or grievances, which involves the Collective Bargaining Agreement (CBA) between the Company and SPAN.

As for corrective action, Poulos and any other officer from the Union are "not to question or address issues with any Customer official that involve concerns with employees regarding violations, outcomes, determinations, interpretations, or grievances, that involve the CBA between the Company and SPAN." Furthermore, any future violations will lead to disciplinary actions including termination (GC Exh. 4b).

That same day, Respondent issued a memo, entitled "Contacting the Customer with Union Issues," to all Union officers (Tr. 48; GC Exh. 5). This memo set forth the following rule: the Customer has stated that you or any other officer of SPAN refrain from directly contacting any Customer officials on any matters that involves concerns with employees regarding violations, outcomes, determinations, interpretations or grievances that involve the CBA between the Company and SPAN. Any issues or concerns regarding the CBA are to be brought to the proper member of the chain of command of the Company. At the end of the memo, Respondent noted, "Nothing in this memo prevents you from filing a charge with or participating, testifying, or assisting in any investigation, hearing, whistleblower proceeding, or other proceeding before any federal, state, or local government agency (e.g. EEOC, NLRB, OSHA, SEC, etc.), nor does anything in this memo preclude, prohibit, or otherwise limit, in any way, your rights and abilities to contact, communicate with, report matters to, or otherwise participate in any whistleblower program administered by any such agencies." Respondent required all union officers to sign this memo.

Costello testified that Respondent issued Poulos a final written warning, rather than a written warning, because it received a corrective action from contracting officer Mary Shaney which theoretically could affect their fee and employees' salaries (Tr. 51). Respondent was downgraded from excellent to very good which may also affect the award fee they receive (Tr. 52). However, Respondent provided no evidence that such a result occurred. Dresbach testified that Poulos received a final written warning as opposed to any other form of discipline because Costello warned Poulos previously not to speak to the Customer about Respondent's employment issues (Tr. 212). The incident on February 16 was another time Poulos failed to

follow Costello's instructions which resulted in "this rude behavior" complaint from Allen (Tr. 212).

As of the date of the hearing, Respondent has not provided the Union with a copy of the classified complaint.

DISCUSSION AND ANALYSIS

A. Credibility

In this case, many of the facts are not in dispute but there is one key issue where I must make a credibility determination: the February 16 conversation. The statement of facts is a compilation of credible and uncontradicted testimony. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, *Inc.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

With regard to the February 16 conversation, I do not credit Fisco's version of events. As for his demeanor, Fisco appeared vague and defensive. Significantly, Fisco's version of events contradicts Allen's complaint. In his unclassified complaint, Allen never stated that Poulos came into Fisco's office addressing Allen alone. Instead Allen wrote about what Poulos sought to clarify. Then Allen wrote, "Poulos turned to me." This phrase clearly supports Poulos' claim that he sought to speak to Fisco rather than Allen, and that Allen then interjected himself into the conversation between Fisco and Poulos. Fisco insisted that Poulos came into his office and began questioning Allen, never speaking to Fisco. It is unlikely that Poulos knew that Allen was in Fisco's office, but instead came into Fisco's office to discuss with him the discipline of these two security officers prior to Poulos' scheduled training he needed to attend. As such I find Fisco's February 17 statement and hearing testimony to be unreliable. Fisco's statement and testimony are also unreliable since he failed to recall that Farnham came into the office and joined the conversation.

Although I did not find Poulos to be entirely reliable either as his demeanor was slightly superior and his testimony to be self-interested at times (for example, his testimony was inconsistent with the credible testimony of Lujan regarding the February 24 events), I do credit Poulos' February 24 written statement regarding the circumstances in which the February 16 conversation took place. I also specifically do not rely upon Poulos' hearing testimony as it was slightly inconsistent with his written statement, which is more reliable as it was written closer in time to the February 16 conversation. I also credit Poulos' testimony that he did not make the statement "that a GS-13 should keep his nose out of this." It is possible that Poulos mentioned the GS status of Allen in another portion of the meeting or in another context. Poulos admitted that he told Allen that he did not have authority to get involved in these issues concerning the

Union CBA. Regardless, this conversation escalated into one where both Allen and Poulos raised their voices when discussing the discipline of the security officers and the CBA.

B. Weingarten Allegations

The complaint alleges that Respondent violated Section 8(a)(1) of the Act when on February 18, 19 and 22, Costello and/or Williams refused to allow union counsel to represent him in an investigatory meeting thereby violating Poulos' *Weingarten* rights. In addition, the complaint alleges that Respondent further violated Section 8(a)(1) of the Act when on February 24 Rutledge and Williams conducted an investigation of Poulos without his representative of choice and required those union representatives to remain silent during the interview.

In support of its allegations, the General Counsel argues that an employer violates the Act when denying an employee his choice of representative if that representative is available (GC Br. at 24). The General Counsel relies upon *Consolidated Coal*, *Co.*, 307 NLRB 976 (1992) and *GHR Energy Corp.*, 294 NLRB 1011 (1989). Relying upon *Southwestern Bell Telephone Co.,*, 251 NLRB 612 (1980) and *Texaco, Inc.*, 251 NLRB 633 (1980), the General Counsel also argues that under *Weingarten*, a union representative not only must be present if requested but also may participate as long as the representative does not seek to bargain or creates an adversarial confrontation (GC Br. at 24).

In contrast, relying upon *Consolidated Casinos Corp.*, 266 NLRB 988 (1983) and *Montgomery Ward & Co.*, 269 NLRB 904 (1984), Respondent argues that it did not improperly deny Poulos' *Weingarten* rights when he requested an "outside attorney" to represent him during the investigatory meeting (R. Br. at 21). Rather, Respondent permitted Poulos to select any one of the union representatives named on the list of union officers provided by the Union, and that an "outside" or personal attorney may not represent a bargaining unit employee during a *Weingarten* meeting. In addition, Respondent argues that Lujan and Campbell played an active role during the February 24 meeting (R. Br. at 23–24).

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act. The rights Section 7 guarantees includes the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

An employer violates Section 8(a)(1) of the Act when it denies an employee's request for union representation at an investigatory interview that the employee reasonably believes might result in disciplinary action. *Weingarten*, supra. Section 7 of the Act guarantees employees the right to "engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection." Id. at 256–257. The Court further explained the right arises "only in situations where the employee requests representation." Id. at 257. And the employee's right to request representation as a condition to participate in the interview "is limited to situations where the employee reasonably believes the investigation will result in disciplinary action." Id. at 257–258. Furthermore, "exercise of the right may not interfere with legitimate employer prerogatives." Id. at 258. The employer may also carry on its inquiry without interviewing the employee, thus leaving to the employee "the choice between having an interview unaccompanied

by his representative, or having no interview and foregoing any benefits that might be derived from one." Id. at 258–259. Finally, "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview." Id. at 259–260.

It is undisputed that Poulos was in a *Weingarten* situation on February 18, 19, 22 and 24, when he requested that Union Counsel Ring represent him in an investigatory meeting. Ring was available immediately and appeared at the February 19 scheduled interview. It is also undisputed that Respondent refused to allow Poulos to have Ring represent him during the investigatory interview. Instead, Respondent presented Poulos with a list of union officers from which he could choose. Eventually, two union vice presidents represented Poulos during the investigatory meeting on February 24 which was a continuation of the *Weingarten* situation. Although Lujan and Campbell attended the investigatory meeting, the dispute in this case centers on whether Ring as union counsel is considered a union representative for purposes of *Weingarten*.

Generally, the *Weingarten* right to representation includes a right to choose a specific union representative if that representative is available. See, e.g., *Anheuser-Busch, Inc.*, 337 NLRB 3, 8–9 (2001), enfd. 338 F.3d 267 (4th Cir. 2003), cert. denied 541 U.S. 973 (2004). "The selection of an employee's representative belongs to an employee and the union, in the absence of extenuating circumstances" *Barnard College*, 340 NLRB 934, 935 (2003) (citing *Anheuser-Busch*, supra, and *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981)). Where an employee's chosen representative is available, the employer violates Section 8(a)(1) by insisting that another union representative represent the employee. *Consolidated Coal*, supra.

In the instant case, I find that Poulos requested Ring as his union representative, and Respondent's multiple denials of his request violates Section 8(a)(1). Ring was available and ready to represent Poulos. Furthermore, Ring, who was designated by the Union as Poulos' representative, is an agent of the Union, and is considered a union representative. Contrary to Respondent's assertion that Ring was merely an "outside" or personal attorney, Costello, Williams and Rutledge knew that Ring was union legal counsel as Poulos introduced Ring as union counsel in his written correspondences with Respondent as well as in person ((Tr. 38–39; GC Exh. 7d, 7f). The right to a *Weingarten* representative is a right to a representative who is an agent of the labor organization which serves as the exclusive representative of the employees. *Weingarten*, supra at 257–258. In addition, the CBA between the parties contains no limiting provisions as to who may be a union representative in investigatory meetings.

Respondent cites to *Consolidated Casinos Corp.* to support its defense that "outside" or personal attorneys cannot represent employees who are represented by an exclusive representative at a *Weingarten* meeting. In *Consolidated Casinos Corp.*, the administrative law judge, in dicta not endorsed by the Board as no exceptions were filed on this specific allegation, rejected the proposition that an employee could request the presence of his personal attorney for a *Weingarten* interview. Supra at 1008. The judge reasoned that requesting a union representative during a disciplinary meeting is acting in the spirit of mutual aid and protection or assistance as set forth in Section 7 of the Act. "All will stand together." Id. A personal attorney, on the other hand, is only requested to protect the interests of that individual and not the interests of the entire bargaining unit which is contrary to the principles underlying *Weingarten* rights. In contrast to the factual scenario in *Consolidated Casinos Corp.*, Poulos made it abundantly clear

that Ring was union counsel, Poulos requested Ring as his representative and the Union designated Ring to represent Poulos during the *Weingarten* meeting. Ring therefore not only represented Poulos but also the interests of the entire bargaining unit, and would be considered an agent of the labor organization.

The situation presented here is analogous to that found in *Public Service Company of New Mexico*, 360 NLRB No. 45 (2014). There, an employee requested the labor organization's assistant business agent to represent him during a *Weingarten* meeting. The assistant business agent was not employed by the employer, and therefore, not a union officer. Instead the assistant business agent was employed by the union and serviced the entire state of New Mexico. The employer denied the employee's request for the assistant business agent to represent him during the disciplinary investigation. The employer denied the request on other grounds, asserting that they were unaware that the assistant business agent was ready and available to represent the employee. The Board affirmed the administrative law judge's findings that the employer violated Section 8(a)(1) of the Act by denying the employee's right to have the available union representative of his choice; the Board did not invalidate the employee's request for union representation for the investigatory meeting merely because the employee requested the assistant business agent and not a union officer to represent him.

Similarly, Ring, as an agent of the Union, was available and appeared at the February 19 meeting. Respondent continually denied Poulos' right to the representative of his choice. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act on February 18, 19, 22, and 24 by denying Poulos his union representative of choice.

With regard to the allegation that Respondent limited Poulos' union representatives' participation in the meeting, I find that although Rutledge initially permitted a few questions, he then told all the participants that he would not allow any further discussion and all questions needed to come through him. Rutledge would not permit any other questions by anyone, including the union representatives, while Poulos prepared his statement. Rutledge permitted Poulos to consult with his union representatives during a break after he provided his written statement to Rutledge but then would only permit the union representatives to ask questions after he conducted the question-and-answer session. Thus, Respondent limited Poulos' union representatives' participation during the meeting.

An employer violates the *Weingarten* rights of an employee when it refuses to allow the employee's union representatives to participate and assist the employee during the investigative interview which may result in discipline. *Postal Service*, 351 NLRB 1226 (2007). The role of the union representative is to provide assistance and counsel to the employee being interrogated. *Weingarten*, 420 U.S. at 262–263. This assistance includes attempts "by the union representative … to clarify the issues" being investigated. See *Postal Service*, supra at 1227 fn. 3 (2007) (quoting *Weingarten*, 420 U.S. at 262 fn. 7). The union representative is entitled to not only attend the meeting but also to provide advice and actively participate, and cannot be required to sit silently. *Washoe Medical Center*, 348 NLRB 361, 361 (2006); *Barnard College*, 340 NLRB 934, 935 (2003). Here, Rutledge stifled Lujan and Campbell's ability to represent Poulos almost immediately from the start of the meeting. Rutledge precluded Poulos from consulting with his representatives about his statement, and they could not ask any clarifying questions during the question-and-answer session. Respondent misses the point by arguing that at certain junctures of

the meeting, Rutledge permitted Lujan and Campbell to speak. He only allowed so under his terms and they could not fulfill their duties to participate and assist Poulos fully during this meeting. In *Lockheed Martin Astronautics*, 330 NLRB 422 (2000), the Board found a violation under similar circumstances, where an employee's representative was prevented from speaking during a certain portion of the investigatory interview, and later permitted to participate. While it may be true that Rutledge had the right to insist on hearing Poulos' own version of events, Rutledge may not lay out such a broad rule that union representatives could only speak when he permitted rather than at a time "when it is most useful to both employee and employer." *Weingarten*, supra at 262.

In sum, I find that Respondent violated Section 8(a)(1) of the Act when on February 18, 19, 22 and 24, it denied Poulos the right to be represented by an available representative of his own choosing. Furthermore, Respondent violated Section 8(a)(1) of the Act when Rutledge required Poulos' union representative to remain silent during certain portions of the investigatory interview thereby depriving Poulos of useful representation.

C. Discrimination Allegation

The complaint alleges that by issuing Poulos on March 24 a final written warning, Respondent also violated the Act. Specifically, the General Counsel alleges that Respondent issued Poulos a final written warning for both invoking his *Weingarten* rights in violation of Section 8(a)(1) as well as for engaging in union activity in violation of Section 8(a)(3) and (1). The General Counsel appears to argue that Respondent's discipline of Poulos is unlawful under both *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and *Atlantic Steel*, 245 NLRB 814, 816–817 (1979).

Rather than relying upon *Wright Line*, the appropriate analysis here is that found in *Burnup & Sims, Inc.*, 256 NLRB 965 (1981). An employee's discipline violates Section 8(a)(3) and (1) of the Act, without regard to an employer's motive, and without regard to a showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity." Id. at 976; *Akal Security, Inc.*, 354 NLRB 122, 124–125 (2009). Furthermore, when an employee is disciplined for conduct that is part of the *res gestae* of protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002). It is Respondent's burden to show that it had an honest belief that the employee engaged in misconduct. The burden then shifts to the General Counsel to prove by a preponderance of the evidence that the employee did not, in fact, engage in that misconduct. See *White Electrical Construction Co.*, 345 NLRB 1095 (2005) (in attempting to enforce the contract, journeyman and union member was engaged in protected concerted activity).

Respondent's final written warning to Poulos stated that he engaged in "serious improper behavior or discourtesy toward a Customer or guest, insubordination." The final written warning specified that on February 16, Poulos improperly and disrespectfully questioned and challenged Allen on his authority regarding the action taken against two PAE security officers. Thereafter, Allen sent a complaint to Respondent about Poulos' action which could have a "potential

negative grading" on PAE's performance. The final written warning stated that Poulos' conduct and behavior is unacceptable and will not be tolerated.

Poulos' clearly engaged in union activity on February 16, which was known by PAE. During this February 16 conversation, Poulos stepped into Fisco's office to talk about the disciplinary letters issued to the two security officers. This conversation led to the discussion between Poulos and Allen about the security officers with Allen perceiving Poulos' question as challenging Allen's authority. Poulos obviously spoke as the union president during this conversation. The record is clear that Respondent violated Section 8(a)(3) and (1) when issuing Poulos a final written warning for his conduct on February 16. Respondent mistakenly believed Poulos engaged in misconduct.

Respondent claims in its disciplinary letter that Poulos engaged in insubordination. The Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and defiant. *Goya Foods, Inc.*, 356 NLRB 476, 479 (2011), citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992).

Where, as here, the conduct arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other rounds sub nom. *Media General Operations, Inc., v. NLRB*, 560 F.3d 181 (4th Cir. 2009). However, the "fact that an activity is concerted … does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems, Inc.*, supra at 837. "[T]here is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996).

"An employer defends a disciplinary action based on employee misconduct that is part of the *res gestae* of the employee's protected activity." *Public Service Company of New Mexico*, 364 NLRB No. 86, slip op. 7 (2016). The Board balances the alleged misconduct against the protected activity to determine whether the misconduct is so serious that it deprives the employee of the protection of the Act, taking into account several factors: (1) The place of discussion; (2) The subject matter of the discussion; (3) The nature of the employee's misconduct; and (4) Whether the misconduct was in any way provoked by the employer's misconduct or unfair labor practices. Id. (citing *Atlantic Steel*, supra at 816–817). "Although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994), citing *NLRB v. Thor Power Tool Co.*, 351 F.2d 554, 587 (7th Cir. 1965). After considering the factors here, I find that Poulos' conduct at the February 16 meeting was not so opprobrious as to cause him to lose the protection of the Act.

As for the first factor, Poulos entered Fisco's office to discuss the disciplinary letters Respondent issued to two security officers. Allen, who was in Fisco's office, interjected himself into this conversation when it appeared that Poulos' challenged the language in the letters. The conversation became heated with both Poulos and Allen raising their voices. The evidence shows that Farnham came into Fisco's office after hearing raised voices, and Poulos admitted that employees asked him what had occurred after hearing raised voices from Fisco's office. Other than Poulos, Fisco, Allen and later Farnham, no other employees came into Fisco's office.

As a result, even though some employees questioned what occurred, the discussion between Poulos and Allen could not have disrupted the work of others, nor has evidence been shown to the contrary. See, e.g., *Noble Metal Processing*, *Inc.*, 346 NLRB 795, 800 (2006) (place of discussion, employee meeting away from employees' work area, weighs in favor of protection as no evidence of disruption to the work processes).

As for the second factor, Poulos' conversation with Allen and Fisco also weighs in favor of protection as his alleged insubordination occurred during a discussion of the security officers' disciplinary letters.

Addressing the third factor, I find that the nature of Poulos' conversation with Allen weighs in favor of protection as well. As set forth above, I credit Poulos' version of February 16 events over Fisco's version. Poulos asserted himself during this meeting, telling Allen that he sought to speak to Fisco about the suspension letters and that Allen did not have the right or authority to be involved in the CBA between the Union and Respondent. Even assuming that Poulos said what Respondent accused him of stating, "A GS-13 should keep his nose out of this," Poulos' statement is still protected by the Act. In either scenario, although Poulos likely raised his voice, Respondent did not allege that Poulos used profane language or physically contacted or threatened Allen or Fisco. See generally *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1323 (nature of the outburst weighed in favor of protection whether employee told another employee to "mind [her] f—king business" during grievance discussion); *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973). The Act allows employees some leeway in the use of intemperate language where such language is part of the *res gestae* of their concerted activity. At worst, Poulos' statement can be seen as nondeferential to Allen but this does not weigh in favor of Poulos losing the protection of the Act. Moreover, as the Union President, Poulos' conduct was well within the bounds of conduct which has been sanctioned by the Board. *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991); *Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006). I do not find Poulos' conduct and alleged statement to be insubordinate contrary to Respondent's assertions.

With regard to the fourth factor, I do not find that this factor weighs in favor of or against finding Poulos' conduct unlawful. Fisco did nothing to provoke Poulos' comments to Allen. Instead, Poulos reacted to Allen's comments while Poulos tried to discuss the suspension letters with Fisco.

In sum, the balance of these factors supports a finding that Poulos' conduct during the February 16 meeting was protected, and did not lose the protections of the Act. Thus, even under *Atlantic Steel*, Respondent's disciplinary action of Poulos for engaging in that conduct was unlawful. The conduct which Respondent attributes to the issuance of the final written warning to Poulos for insubordination was protected conduct.

In the alternative, even under the burden-shifting framework of *Wright Line*, Respondent's discipline of Poulos violates the Act. The General Counsel has met his initial burden under the *Wright Line* test.

As set forth above, Poulos engaged in protected and concerted activity, and Respondent was well aware of such activity. Thus, the General Counsel has established that Poulos engaged

in union activity, and Respondent was aware of such. Poulos' union activity was a motivating factor in Respondent's decision to discipline him. One of the documents considered by the DRB in deciding to discipline Poulos was a February 10 memo written by Williams, who was a decision-maker on the DRB. Williams wrote that Poulos called him that day being "very rude and yelling" about the discipline of security officers. Williams further wrote that he told Poulos that since he became union president PAE has had nothing but problems, and Poulos has filed many Board charges. This memo is telling in the animosity Respondent had towards Poulos' role as a union president which leads to the conclusion that Respondent was motivated by animosity towards Poulos' union activity rather than a legitimate business reason to discipline him. This memo has no relevance or connection to the February 16 incident. Furthermore, as soon as 1 to 2 days after receiving Allen's complaint, Respondent, including Williams, decided that Poulos needed to be disciplined before investigating Allen's complaint.

The timing of events is also suspect. The Board has long held that the timing of adverse action shortly after an employee engaged in union activity will support a finding of unlawful motivation. See *Real Foods Co.*, 350 NLRB 309, 312 (2007). Almost immediately after receiving Allen's complaint, Respondent decided to discipline Poulos. Furthermore, regarding the alleged rule that Poulos violated, Respondent insisted that they had warned Poulos several times not to speak to the Customer, but as set forth above, I do not credit Respondent's version of events. Costello only documented his alleged discussions with Poulos not to speak to the Customer after the investigation of the February 16 incident was underway. In addition, Respondent on the same day it disciplined Poulos for violating said rule, issued its written rule regarding union officer's prohibition on speaking with the Customer on union matters. The timing is persuasive evidence that Respondent sought to temper Poulos' union activity.

The General Counsel has met his burden, and the burden shifts to Respondent. Respondent argues that the DRB did not consider Williams' February 10 memo (R. Br. at 32–33 fn. 8). Respondent claims that Dresbach testified that the DRB did not also discuss the number of charges filed by the Union and the memo was not relevant. However, this memo was included in the packet of investigative material sent to the DRB in determining what level of discipline to issue to Poulos. Even assuming that Dresbach testified truthfully, Williams' memo was still part of this packet, and Respondent has not shown that the DRB explicitly rejected this memo. One can assume that all DRB members reviewed the packet of information, and need not discuss every item in the investigatory packet to determine the level of discipline. Furthermore, Williams' memo has no relevance to the February 16 incident but yet, the memo was still included in the investigatory packet. Respondent claims that it disciplined Poulos due to the corrective action it received from the Customer. However, this corrective action is not explicitly referenced or discussed in Poulos' final written warning. Instead, the disciplinary action references "potential negative grading" of Respondent's performance. Providing shifting explanations for its decision to discipline Poulos indicates animus on the part of Respondent.

Also in its brief, Respondent claims that Poulos was disciplined because of his "rude and condescending behavior" towards Allen, not because he spoke to Allen previously about this same incident regarding the security officers, for which Poulos was not disciplined (R. Br. at 29–30). I disagree with Respondent's characterization of the disciplinary letter. Poulos' disciplinary letter specifically states that he had been advised not to contact the Customer for any matter involving the CBA which includes discussing matters affecting discipline (GC Exh. 4a). In

addition, Dresbach testified that Poulos was disciplined because he had been told not to speak to the Customer about employment matters concerning PAE employees. Respondent has failed to provide any evidence that it would have disciplined Poulos' absent protected activity. Furthermore, as discussed later, I find that Respondent's rule not permitting union officers to discuss CBA matters with the Customer is unlawful as the rule was promulgated in response to union activity and applied to restrict Section 7 rights.

It is without a doubt that Respondent disciplined Poulos for his union activity thereby violating Section 8(a)(3) and (1) of the Act. However, I do not find that Respondent disciplined Poulos for invoking his *Weingarten* rights in violation of Section 8(a)(1). As set forth above, Costello, Williams, Fisco, and Dresbach, all members of the DRB, determined that Poulos needed to be disciplined before they even investigated the February 16 incident. Thus, Respondent's motivation for disciplining Poulos was not his invocation of *Weingarten* rights but his union activity. Indeed, Respondent, in its posthearing brief, advances such an argument (R. Br. at 30), with which I agree. Thus, I dismiss this allegation in the complaint.

Based upon the foregoing, I conclude that Respondent violated Section 8(a)(3) and (1) when it issued Poulos a final written warning for his conduct on February 16.

D. Interrogation Allegation

The complaint alleges Respondent also violated Section 8(a)(1) when on February 24, Williams and Rutledge at the facility interrogated Poulos about his union activities. With regard to the alleged interrogation, Respondent contends that Poulos' union activity was not questioned but instead the *Weingarten* interview was limited to the events of February 16.

In assessing the lawfulness of an interrogation, the Board applies the test set forth in *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). It is [well established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with the rights guaranteed by the Act." Id. The Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter. *Norton Audubon Hospital*, 338 NLRB 320, 320–321 (2002); *Intertape Polymer Corp.*, 360 NLRB 114 (2014).

Rutledge, who is not Poulos' supervisor, met with Poulos and his representatives on February 24 to investigate the events of February 16. Poulos is obviously an open and active union supporter. They met in one of Respondent's conference rooms. Poulos made certain from the outset of the meeting that Rutledge knew that he was engaged in union activity on February 16. After taking Poulos' statement, Rutledge began asking a series of questions. Although the subject matter of the February 16 discussion concerned the discipline of two security officers, Rutledge never questioned Poulos on the issues surrounding the security officers' discipline nor did he question Poulos' role as a union representative. Rutledge's questions focused on Poulos' alleged statements and conduct during the February 16 meeting as well as details of how the meeting progressed.

Although the Board has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct, that right is not unlimited. See *Fresenius USA Mfg., Inc.*, 362 NLRB No. 130, slip op. at 1 (2015) (investigation of alleged employee harassment). Where it is apparent from an initial investigation that the employee engaged in activity protected by the Act, the employer may not disregard that fact and forge ahead with the investigation as a precursor to potential discipline. See *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (employer's initial investigation of harassment charges permissible but once initial investigation showed that alleged misconduct protected by the Act, it was unlawful to continue the investigation).

Applying the above principles, I find that under the totality of the circumstances, Respondent unlawfully interrogated Poulos. Poulos' conduct during the February 16 meeting was union activity which was protected under the Act. After receiving Allen's complaint, Fisco then wrote a statement summarizing his version of events. Thereafter, Respondent determined that Poulos needed to be disciplined *before* deciding to investigate the matter. Despite making this decision, Respondent decided to question Poulos during a *Weingarten* meeting on February 24. Simply because Allen complained that Poulos' conduct during the meeting was "bullying" and "insubordination" does not permit Respondent to stymie Poulos' Section 7 rights to represent his constituents. Furthermore, as found above, Poulos' conduct remained well within the bounds of protected activity. Thus, Respondent violated Section 8(a)(1) of the Act when Rutledge interrogated Poulos on February 24.

E. The Rules Allegations

The complaint alleges that Respondent promulgated and implemented two rules which violates Section 8(a)(1) of the Act. On February 24, the General Counsel alleges that Respondent implemented the following rule: union representatives are not permitted to participate in any defense or ask any questions; only upon notification by the Employer may they talk after the completion of investigatory interviews. On March 24, the General Counsel alleges that Respondent implemented the following rule: the Customer has stated that you or any other officer of SPAN refrain from directly contacting any customer officials on any matters that involves concerns with employees regarding violations, outcomes, determinations, interpretations or grievances that involve the CBA between the Company and SPAN. Any issues or concerns regarding the CBA are to be brought to the proper member of the chain of command of the Company.

When evaluating whether a rule violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonable construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, supra at 647.

As explained above, the Board has clearly determined that an employer violates the Act when it refuses to allow the employee's union representatives to participate and assist the employee during the investigative interview which may result in discipline. *Postal Service*;

Washoe Medical Center; *Barnard College.* On February 24, when Rutledge set forth the rule of when union representatives may speak during the investigatory meeting, Respondent set forth an overly restrictive rule which infringes upon the employees' Section 7 rights of requesting union representatives' assistance and counsel during an investigatory meeting. Therefore, Respondent violated Section 8(a)(1) when Rutledge orally promulgated the rule on February 24 on when union representatives may provide assistance and counsel during an investigatory meeting. Respondent's rule relegated Poulos' union representatives as mere observers which contradicts the purpose of *Weingarten* rights for employees.

Respondent relies upon the Board's decision in *St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006), for the proposition that an oral statement cannot constitute a rule.[23] However, the decision in *St. Mary's* may be distinguished from the facts presented here. In *St. Mary's*, during a phone conversation, a supervisor told a known union supporter not to call the nurse's floor and "chew out my nurses" and talk to any employee about the union while the union supporter was on leave or at any time. Id. at 782. The union supporter pushed back against the supervisor's statement, and the two engaged in a back-and-forth disagreement before the conversation ended. In addition, around this same time period, an on-duty nurse complained about the union supporter bothering her while she was working and expressed her desire not to be "harassed about union matter." Id. at 783. The judge, with whom the Board agreed, determined that the situation between the supervisor and the union supporter was an "isolated difference of opinion", and not an unlawful rule. Id. In contrast, during the *Weingarten* meeting, Rutledge quickly set forth the parameters of how the meeting would occur, based upon his experience, and would not permit Poulos' union representatives from speaking during certain times. I find that in this context, Rutledge's comments could reasonably be interpreted as a rule forbidding union representatives from talking during *Weingarten* meetings which completely undermines their duty to represent employees. Thus, I reject Respondent's defense as invalid, and find that Respondent violated Section 8(a)(1) of the Act when Rutledge set forth a rule limiting union participation during the *Weingarten* meeting.

Respondent also argues that the General Counsel has failed to prove that it has "maintained" the February 24 rule. The General Counsel proved, based on the credited evidence, that Respondent set forth a rule during the February 24 investigatory meeting about when union representatives may participate in an investigatory meeting. Once the rule was established, I do not find it necessary for the General Counsel to prove that Respondent applied the rule to subsequent *Weingarten* meetings.

As for the March 24 rule, Respondent also violated Section 8(a)(1) of the Act when it promulgated the rule in response to union activity. Respondent's rule states that the Customer has asked that union officers refrain from contacting any of the Customer's officials on any matters concerning its own employees "regarding violations, outcomes, determinations, interpretation or grievances that involve the CBA" between Respondent and the Union. At the end of this memo setting forth the rule to the union officers, Respondent noted that the memo

[23] Respondent also relies upon *Flamingo Las Vegas Operating Co., LLC*, 359 NLRB 873 (2013), which relies upon the Board's decision in *St. Mary's*. However, the Board set aside its decision in *Flamingo Las Vegas Operating* due to the Unites States Supreme Court's decision in *NLRB v. Noel Canning, a division of the Noel Corp.*, No. 12-1281, 134 S. Ct. 2550, 2014 WL 2882090 (June 26, 2014).

does not preclude the filing of a charge or participating, testifying or assisting in any investigation before federal, state or local government agencies including the NLRB. Importantly, Respondent issued this rule to all union officers, requiring their signature, *after* unlawfully disciplining Poulos for engaging in union activity.

The Board has held that employees' concerted communications regarding matters affecting their employment with other employees, their employer's customers, or with third parties such as governmental agencies are protected by Section 7 and cannot lawfully be banned. *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990). In *Kinder-Care Learning Centers*, the Board found that a daycare center violated Section 8(a)(1) of the Act by requiring employees to resolve their work-related disputes through the company's process and not discuss those issues with the Customers, including coworkers. Failure to follow the daycare center's rule could result in discipline, including discharge.

Respondent's March 24 rule does not explicitly prohibit Section 7 activity, but Respondent issued this rule on the same day it disciplined Poulos, in part, for contacting the Customer to discuss the discipline of two security officers represented by the Union. Although the rule does not explicitly state that union officers will be disciplined if they discuss representational matters with the Customer, Poulos' final warning demonstrates that Respondent will discipline union officers for such infractions.[24] Even though Respondent provided a proviso specifically excluding certain actions from its rule, the rule, as read objectively, specifically restricts union officials from protesting or discussing the terms and conditions of employment on behalf of themselves and the employees they represent with the Customer. Moreover, the Customer plays a crucial role in determining terms and conditions of employment for Respondent's employees including licensure. Under these circumstances, it is certain that Respondent's rule requires strict compliance by union officers. Such a rule reasonably tends to inhibit union officers from bringing work-related matters to entities other than Respondent which restrains the union officer's role in protecting employees' Section 7 rights. As such, Respondent violated Section 8(a)(1) of the Act when it implemented the March 24 rule.

F. Information Request Allegations

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act since February 22 when they failed to provide the Union with a copy of the customer complaint against Poulos as well as the allegations within the complaint. It is further alleged that the information requested is necessary for, and relevant to, the Union as the exclusive representative of Respondent's employees and Respondent failed to provide the customer complaint in violation of the Act. Respondent argues that since Allen's original complaint was designated by the United States government as classified, PAE could not provide it to the Union but instead provided an unclassified version of the complaint to the Union (R. Br. at 33–34). The credited evidence shows that the Union received the unclassified complaint on or about the day Poulos was disciplined.

[24] As such, Respondent's discipline of Poulos, in part for contacting the Customer thereby violating this rule, is a violation of the Act as the rule is found to be unlawful. *Double Eagle Hotel & Casino*, 341 NLRB 112, 123 (2004).

Section 8(a)(5) requires an employer to furnish the union representing its employees with information that is relevant to the union in the performance of its collective-bargaining duties including representing employees in potential disciplinary actions. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). The required showing is subject to a liberal, "discovery-type standard" and is not an exceptionally heavy one. The union need only show a probability that the desired information was relevant, and would only be used by the union to carry out its statutory duties and responsibilities. A request for information can be made in writing or orally. *Anheuser-Busch, Inc.*, 342 NLRB 560, 567 (2004).

When the union's request relates to information pertaining to employees in the unit which goes to the core of the employer-employee relationship, such information is presumptively relevant. Although Rutledge, who investigated Allen's complaint, did not review the classified complaint and did not include the classified complaint in the investigatory materials, the classified complaint was reviewed by members of the DRB. Allen's classified complaint prompted Respondent's investigation and subsequent discipline of Poulos. Accordingly, the classified complaint is relevant and necessary for the Union in its role of representing Poulos. The classified complaint may not be dispositive but has at least some bearing on the discipline of Poulos.

As a defense, Respondent claims that it "simply could *not* furnish a document that was designated as "classified" by the U.S. Government." (R. Br. at 34 (emphasis in original)). Respondent suggests that since the Union was provided the unclassified complaint that Respondent has fulfilled its obligation, essentially providing an accommodation. However, I reject this defense. The defense presented by Respondent is similar to the confidentiality defense provided by a party in information request cases. A party may refuse to furnish confidential information to a party under certain circumstances. The refusing party, who has the burden of proof, must show that it has a legitimate and substantial confidentiality interest in the information sought. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Confidentiality claims must also be timely raised. *Gas Spring Co.*, 296 NLRB 84, 99 (1989) (claim belatedly raises and brought up as an afterthought not upheld). Blanket claims will not be upheld. *Pennsylvania Power Co.*, supra. However, if that showing is made, the Board balances the need of the party requesting the information against any "legitimate and substantial confidentiality interests" established by the refusing party. *Howard Industries, Inc.*, 360 NLRB No. 111, slip op. 2 (2014), citing *Detroit Edison v. NLRB*, 440 U.S. 301, 315, 318–320 (1979). In addition, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. *Pennsylvania Power Co.*, supra.

Here, Respondent states that the United States Government marked Allen's complaint as classified. Obviously, the record is devoid of any evidence as to why Allen's complaint was marked classified. The parties also do not disagree that United States Government determined the classification status of this complaint, and only the United States Government can change the classification of this complaint. This complaint was shared with PAE management which led to their decision to unlawfully discipline Poulos. Poulos, and his union representatives, hold security clearances which allow them to see top secret documents in secured areas in certain buildings. While Respondent cannot de-classify documents, Respondent, who has a bargaining relationship with the Union, failed to bargain with the Union on a suitable accommodation. Instead, Respondent unilaterally asked Allen to create an unclassified complaint to provide to the

Union, which was not provided until the day before he was disciplined and well after his *Weingarten* interview. Certainly, Allen's classified complaint, not the unclassified complaint, led to Poulos' discipline. Respondent failed to bargain with the Union on any accommodation. Moreover, Respondent failed to inform the Union that the complaint was classified until the February 24 *Weingarten* meeting. Respondent did not mention the top secret status of this complaint in its back-and-forth email exchange with Poulos, instead refusing to provide the complaint because of the ongoing investigation. One of the Union's roles is to represent employees, even its president, in investigations, and investigatory documents are relevant to the Union's duties. By failing to bargain with the Union on an accommodation, Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, PAE Applied Technologies, LLC, has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, Security Police Association of Nevada, is a labor organization within the meaning of Section 2(5) of the Act that serves as the exclusive collective-bargaining representative of the following appropriate unit of employees within the meaning of Section 9(a) of the Act:

   Full-time and regular part-time security officers performing guard duties as defined in Section 9(b)(3) of the Act.

3. By failing on February 18, 19, 22, and 24 to provide an employee, including Poulos, with the union representative of his choice who is available when requested in an investigatory interview which the employee reasonably believed might result in discipline, Respondent has violated Section 8(a)(1) of the Act.

4. By refusing to allow a union representative to participate and assist an employee during portions of an investigatory interview held on February 24, Respondent violated Section 8(a)(1) of the Act.

5. By issuing Poulos a final written warning on March 24 for his union activity, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By interrogating employees, including Poulos, on February 24 about his union activities, Respondent violated Section 8(a)(1) of the Act.

7. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by promulgating and maintaining the following rules or directives since February 22 and March 24, respectively: (1) union representatives are not permitted to participate in any defense or ask any questions; only upon notification by the Employer may they talk after the completion of investigatory interviews; and (2) the Customer has stated that you or any other officer of SPAN refrain from directly contacting any customer officials on any matters that involves concerns with

employees regarding violations, outcomes, determinations, interpretations or grievances that involve the CBA between the Company and SPAN. Any issues or concerns regarding the CBA are to be brought to the proper member of the chain of command of the Company.

8. By failing to offer to bargain with the Union for an accommodation of interests in response to the Union's request for the following relevant information, which is classified by the United States Government, it requested since February 22:

A copy of the customer complaint lodged against Poulos as well as the allegations contained therein,

Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

9. Respondent did not engage in any other of the unfair labor practices alleged in this proceeding.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In this regard, Respondent shall expunge Poulos' March 24 final written warning from his record. Respondent shall also rescind or revise its unlawful rules as set forth above. Respondent will be ordered to bargain in good faith with the Union in attempt to reach an accommodation to the Union's request for relevant information. I note that Respondent violated the Act as alleged regarding the information request but the necessity of the relevant information sought may be moot by my finding that Respondent violated the Act by disciplining Poulos.

I will order that the Employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id., at 13.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

Respondent, PAE Applied Technologies, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing and refusing to permit an employee from selecting a union representative of his choice who is available when requested when an employee reasonably believes the discussion might led to discipline.

(b) Failing and refusing to permit union representatives to speak during certain portions of a meeting where an employee selects a union representative of his choice when he reasonably believes the discussion might lead to discipline.

(c) Issuing a written final warning to Union President John Poulos for engaging in union activity.

(d) Interrogating employees about their union activities.

(e) Maintaining and/or enforcing a rule which prohibits union representatives from speaking on behalf of employees during investigatory meetings, and maintaining and/or enforcing a rule which prohibits union officers from speaking to the Customer on matters concerning its role as exclusive representative of a unit of employees at Respondent.

(f) Refusing to bargain in good faith with the Union in an attempt to reach an accommodation in response to the Union's request for relevant information concerning the Customer complaint lodged against Poulos as well as the allegations contained therein, in which the United States Government classified the complaint and Respondent has no control of the classification of the document.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of the Board's Order, remove from its files any reference to Poulos' final written warning and within 3 days thereafter, notify Poulos in writing that this has been done and that the discipline will not be used against him in any way.

(b) Rescind and/or revise the rules issued on February 22 and March 24 as referenced above.

(c) Bargain in good faith with the Union regarding its request for the Customer complaint against Poulos, in order to reach an accommodation, and thereafter comply with any agreement reach through such bargaining.

(d) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, the attached notice marked "Appendix"[26] on forms provided by the Regional Director

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice

for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 18, 2016.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 5, 2016

Amita Baman Tracy
Administrative Law Judge

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reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT deny your request for a union representative of your choice who is available when you reasonably believe you may be questioned in a manner that could lead to discipline.

WE WILL NOT prevent your union representative from speaking during a meeting when you reasonably believe you may be questioned in a manner that could lead to discipline.

WE WILL NOT discipline John Poulos for his union activities.

WE WILL NOT interrogate employees about their union activities.

WE WILL NOT maintain and/or enforce a rule that prohibits union representatives from speaking during an investigatory meeting, and maintain and/or enforce a rule that prohibits union officers from speaking to the Unites States Government on matters concerning its duties as exclusive representative of a unit of employees at PAE Applied Technologies, LLC.

WE WILL NOT refuse to bargain with the Union in an effort to reach an accommodation in response to the Union's request for relevant information that has been classified by the United States Government.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL within 14 days from the date of this Order, remove from our files any references to the unlawful discipline of Johns Poulos, and notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL rescind and/or revise the February 22 rule prohibiting union representatives from speaking during an investigatory meeting, and rescind and/or revise the March 24 rule prohibiting union officers from speaking with the Unites States Government on matters concerning its duty as exclusive representative of a unit of employees at PAE Applied Technologies, LLC.

WE WILL bargain in good faith with the Union regarding its request for the Customer complaint lodged against Poulos as well as the allegations contained therein, and thereafter comply with any agreement reach through such bargaining.

PAE APPLIED TECHNOLOGIES, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004–3099

(602) 640–2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-170331 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640–2146.